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Salazar v. Buono: A Blow against the Endorsement Test's Core Principle

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SALAZAR V. BUONO: A BLOW AGAINST THE ENDORSEMENT TEST'S CORE PRINCIPLE

INTRODUCTION

The First Amendment of the United States Constitution declares, in part, that "Congress shall make no law respecting an establishment of religion."[1] In the past half-century, the Establishment Clause's deceptively simple words have ignited an intense philosophical and jurisprudential debate over the requisite distance between religion and government. In *Lemon v. Kurtzman*,[2] the United States Supreme Court offered guidance in the form of a three prong test used to determine whether church and state have become unconstitutionally intertwined.[3] But *Lemon* was far from the final word on Establishment Clause interpretation, and since that case, a spectrum of conceptualizations have competed for dominance within the Court. Although the concept of an impermeable "wall of separation" between church and state is a dead ideal in the current Court,[4] two other broad Establishment Clause interpretations have remained relevant. The first refines the *Lemon* test into an inquiry invalidating state action that endorses or discourages religion in the eyes of a reasonable observer or is intended to do so (endorsement test).[5] The other resists *Lemon*, viewing religion's significance in American history as vindication of a permissive interpretation allowing the government to accommodate religion so long as it does not exert government force to coerce religious practice (coercion test).[6]

The recent Supreme Court case of *Salazar v. Buono*[7] captured the attention of commentators hoping the Supreme Court would finally resolve whether and when displays of religious icons violate the Establishment Clause.[8] Disappointingly, the case's procedural quagmire prevented the Court from reaching its most compelling doctrinal questions.[9]

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1. U.S. Const. amend. I.

2. 403 U.S. 602 (1971).

3. The three prongs are (1) "the statute must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) "the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

4. Frederick Mark Gedicks, *Undoing Neutrality? From Church-State Separation to Judeo-Christian Tolerance*, 46 WILLAMETTE L. REV. 691, 706 (2010).

5. *See* Lynch v. Donnelly, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring).

6. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part); *see also* Van Orden v. Perry, 545 U.S. 677, 686–88 (2005).

7. (*Buono*), 130 S. Ct. 1803 (2010).

8. The Supreme Court, 2009 Term—Leading Cases, 124 HARV. L. REV. 219, 225 (2010) [hereinafter *Leading Cases*].

9. *See id.*

Instead, the Court remanded the case to the district court to conduct a so-called endorsement inquiry.[10] However, the analytical framework the Court provided to the district court embodied values adverse to those that the endorsement test was designed to protect. By blurring the distinction between the endorsement test's independent prongs, injecting incongruous principles into the test, and calling the test's "reasonable observer" standard into question, the Court effectively hollowed out the endorsement test and replaced its core with that of the coercion test.

This Comment argues that *Buono* endangers a worthwhile value embedded in the endorsement test—the principle that government may not make "adherence to a religion relevant in any way to a person's standing in the political community."[11] Although displays of religious iconography do not technically compel citizens to religious observance, they potentially threaten religious liberty by conveying the message that the government favors a particular religion. Such a message exerts pressure on individual citizens to adhere to the favored religion so that they may benefit from government favoritism.[12] On remand, the district court should be conscious that this rationale brought about the Court's initial development of the endorsement test and should strive to preserve it.

Part I of this Comment presents a line of Supreme Court Establishment Clause cases, highlighting the tension between the endorsement and coercion tests. Part II summarizes *Buono*'s facts, procedural history, and opinions. Part III defends the endorsement test as the best means for preventing the government from dividing the community into favored and disfavored members on the basis of religion, explores how *Buono*'s distortion of the endorsement test threatens the principle of separation of church and state, and suggests how the district court's analysis on remand could follow the Supreme Court's framework while still keeping that principle alive. This Comment concludes that while *Buono* stopped short of definitively repudiating the endorsement test, it undeniably jeopardized the test's core value.

I. BACKGROUND

A. The Endorsement Test's Origin

The First Amendment of the Constitution secures some of the most fundamental rights recognized by free societies. Specifically, the Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion."[13] This language

10. *Buono*, 130 S. Ct. at 1820–21.

11. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

12. *See* Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1160 (10th Cir. 2010) (invalidating state displays of crosses because they may lead non-Christians to believe they could receive benefits for becoming Christian).

13. U.S. CONST. amend. I.

poses interpretive difficulties because the definition of "establishment" is contentious and because the word "respecting" indicates that the government's religious involvement must stop at some point short of full establishment.[14]

1. *Lemon v. Kurtzman*

In *Lemon v. Kurtzman*, the Court resolved the clause's interpretive difficulties through a case law synthesis. Drawing upon past Establishment Clause decisions, the Court developed three requirements the government must meet when its actions become associated with religion: (1) the action must have a secular purpose (purpose prong); (2) the action's principal effect must "neither advance[] nor inhibit[] religion" (effect prong); and (3) the action must not foster excessive government entanglement with religion (entanglement prong).[15] These three prongs appear to correspond with each of "three main evils" identified by the *Lemon* Court as the primary harms against which the Establishment Clause was intended to protect: (1) state sponsorship of religion; (2) state financial support of religion; and (3) state involvement in religious activity.[16]

In *Lemon*, the Court applied the above test to invalidate two state statutory programs that allocated public funds to religious private schools.[17] Both programs were held to be unconstitutional despite the fact that public assistance could only be used to fund secular instruction under the statutes.[18] In its analysis, the Court found that the legislature's express intention to enhance the secular components of parochial education was a valid secular purpose under the purpose prong.[19] However, the Court found that in order to implement the programs in accordance with their secular purpose, the states would need to engage with religion in a manner that constituted excessive entanglement.[20] First, the fact that the government would need to institute a "comprehensive, discriminating, and continuing . . . surveillance" of religious private schools and supervise teachers to ensure the public funds were used only for non-ideological education.[21] The surveillance would necessitate perpetual entanglement between the state governments and religious schools.[22] Second, a danger of excessive government entanglement with religion stemmed from the programs' politically divisive nature.[23] The Court reasoned that the need for annual appropriations would incentivize parochial

14. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
15. *Id.* at 612–13.
16. *Id.* at 612.
17. *See id.* at 615–22.
18. *Id.* at 613–14.
19. *Id.* at 613.
20. *Id.* at 619–22.
21. *Id.* at 619.
22. *Id.*
23. *Id.* at 622.

schools to use political action to secure greater appropriations.[24] Fearing that voters, presented with the choice of whether or not to allocate more funds to religious schools, would align with their individual sects,[25] the Court recognized the potential of creating a "political division along religious lines," which the Court noted was "one of the principal evils against which the First Amendment was intended to protect."[26] Therefore, both the surveillance that was required to ensure that the schools used the public funds for nonreligious instruction and the potential for political divisiveness along religious lines constituted excessive government entanglement with religion.[27] Having resolved the case under the entanglement prong, the Court lacked occasion to analyze the programs under the effect prong.[28]

Lemon has become a seminal case in Establishment Clause jurisprudence, but not a universally accepted one. In future decisions, the Court became divided between critics and supporters of *Lemon*'s underlying themes of government neutrality in religious matters and limited involvement between church and state.

2. *Lynch v. Donnelly*

In *Lynch v. Donnelly*[29], the Court validated a city-owned display featuring a crèche,[30] among several secular objects associated with Christmas, under the Establishment Clause.[31] In doing so, the majority undermined the authority of the *Lemon* test as merely useful considerations based on the context of the case.[32] Refusing to subscribe to a single rule, the Court characterized the line between permissible and impermissible government involvement with religion as blurred and unfixed, and declared that attempting to erect an unwavering wall between church and state would contradict American historical traditions.[33]

Consequently, the Court took into consideration what it called America's "unbroken history of official acknowledgement" and accommodation of religion.[34] In doing so, the Court pointed to governmental acts such as Congress's enactment of "legislation providing for paid chaplains to the House and Senate" the same week it approved the Estab-

24. *Id.* at 622–23.
25. *Id.* at 622.
26. *Id.* at 622 (citing Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).
27. *Id.* at 613–14, 620–22.
28. *Id.* at 613–14.
29. 465 U.S. 668 (1984).
30. A crèche, also called a Nativity scene, is described as consisting of "traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals." *Id.* at 671.
31. *Id.* at 680–86.
32. *Id.* at 679.
33. *Id.* at 678–79.
34. *Id.* at 674.

lishment Clause.[35] The Court also noted several other historical examples of the United States affirmatively accommodating and acknowledging religion, including: President George Washington's religiously-influenced declaration of Thanksgiving as a national holiday with religious overtones; the motto "In God We Trust" on our currency; and the phrase "One Nation, under God" in the Pledge of Allegiance.[36] The Court reasoned that if such overt government advancements of religion were acceptable under the First Amendment, then a "passive" crèche display in the context of the Christmas season could not violate the Establishment Clause.[37]

3. Development of the Endorsement Test

Justice O'Connor wrote an influential concurring opinion in *Lynch* introducing the endorsement test to clarify the Court's Establishment Clause doctrine.[38] Justice O'Connor reasoned that the Establishment Clause's primary purpose is to prevent the "government from making adherence to a religion relevant in any way to a person's standing in the political community."[39] According to Justice O'Connor, the state could violate this prohibition in two ways: (1) through excessive entanglement with religion or (2) through endorsement or disapproval of religion.[40] Under Justice O'Connor's rationale, endorsement affected citizens' political standing by designating adherents and nonadherents as insiders and outsiders, and thus divided them into favored and disfavored political community members.[41] The division frustrated religious liberty by pressuring citizens to adhere to the favored religion in hopes of preferential treatment. Although most government actions send some sort of message encouraging or discouraging certain behavior, the Establishment Clause created a constitutional mandate that the government withhold from exerting this type of influence over matters of religion.

Some commentators have described the endorsement test as a revision of the three prong *Lemon* test into a test with two parts.[42] *Lemon*'s entanglement prong remained unaffected, but its purpose and effect prongs were combined into a single test inquiring whether the government had the purpose or effect of endorsing religion.[43] It is important to emphasize that, although the purpose and effect prongs are "combined" in the sense that they both now focus on endorsement, Justice O'Connor

35. *Id.*
36. *Id.* at 674–77.
37. *See id.* at 686.
38. *Id.* at 687 (O'Connor, J., concurring).
39. *Id.*
40. *Id.* at 687–88.
41. *Id.* at 688.
42. *See e.g.*, Paul Forster, Note, *Separating Church and State: Transfers of Government Land as Cures for Establishment Clause Violations*, 85 CHI.-KENT L. REV. 401, 405 (2010).
43. *Id.*

explicitly preserved them as distinct subparts of the overall analysis. [44] In applying the endorsement test, Justice O'Connor found that the Establishment Clause was violated *either* where the government subjectively intended to endorse or disapprove of religion, thus infringing on the purpose prong, *or* when it ran afoul of the purpose prong by "objectively" conveying a message that would in fact endorse or disapprove of religion in the eyes of a reasonable observer.[45] The four *Lynch* dissenters also applied the endorsement test,[46] making it the standard agreed upon by a five-Justice majority.

B. Tension Between Endorsement and Coercion

1. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*[47]

In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, the Court again considered whether city-owned displays associated with religious holidays violated the Establishment Clause.[48] There were two displays at issue, both in downtown Pittsburgh.[49] The first was a crèche located on the county courthouse steps.[50] The second was a Chanukah menorah placed alongside a Christmas tree and a "sign saluting liberty" located outside a building jointly owned by the City of Pittsburgh and the County of Allegheny.[51]

In evaluating the constitutionality of these displays, the majority adopted the endorsement test.[52] The Court defined "endorsement" as government action that conveys or attempts to convey "a message that religion or a particular religious belief is *favored* or *preferred*."[53] The Court elaborated that it would evaluate the message conveyed by public religious displays through the eyes of a hypothetical "reasonable observer."[54]

Applying this standard, the Court found that the crèche display violated the Establishment Clause.[55] The crèche failed the endorsement test's effect prong because it had "the effect of endorsing a patently Christian message."[56] Unlike the display at issue in *Lynch*, the crèche was not surrounded by secular symbols to offset its religious message.[57]

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44. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (reasoning that Pawtucket did not intend a message of endorsement of Christianity or disapproval of non-Christian religions).
45. *See id.*
46. *Id.* at 695 (Brennan, J., dissenting).
47. 492 U.S. 573 (1989).
48. *Id.* at 578.
49. *Id.*
50. *Id.*
51. *Id.*
52. *See id.* at 592.
53. *Id.* at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).
54. *Id.* at 620.
55. *Id.* at 579.
56. *Id.* at 601.
57. *See id.* at 598-99.

The menorah, on the other hand, survived the Court's scrutiny because it was displayed alongside a Christmas tree and a sign saluting liberty, and the menorah was seen as a symbol of Chanukah, which has "religious and secular dimensions."[58] The Court determined that these objects displayed together created an "overall holiday setting" that would lead a reasonable observer to interpret the display as a secular recognition of various traditions with no favoritism or preference on the part of the State.[59]

Justice Kennedy wrote separately in *Allegheny,* stating that the majority's approach "reflect[ed] an unjustified hostility toward religion."[60] He reasoned that the endorsement test was "flawed in its fundamentals and unworkable in practice[,]" and that if applied consistently, would invalidate longstanding traditions of accommodating, acknowledging, and supporting religion.[61]

According to Justice Kennedy, under the Establishment Clause, the government is limited in recognizing and accommodating religion by two principles: (1) the government may not coerce its subjects to practice religion,[62] and (2) the government may not confer direct benefits upon religion so substantial that they would tend to establish a national faith.[63] Justice Kennedy's test became known as the coercion test,[64] under which religious displays were found to be acceptable passive accommodations because a passersby may freely ignore them.[65]

2. The Ten Commandments Cases

For the two decades since the *Allegheny* decision, the endorsement test has been the touchstone Establishment Clause test; however, not all Justices on the Court have agreed that it is the proper test to use.[66] The tension between the Justices' widely varying views on the Establishment Clause recently led the Court toward seemingly contradictory rulings regarding permanent Ten Commandments displays on public property.[67]

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58. *Id.* at 613–14.

59. *See id.* at 614, 20.

60. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).

61. *See id.* at 669–70.

62. *Id.* at 659. Examples of legal coercion include compulsory "participation or attendance at a religious activity, requiring religious oaths to obtain government office or benefits, or delegating government power to religious groups." *Id.* at 660 (citations omitted).

63. *Id.* at 659. Examples of sufficiently substantial direct benefits to religion include "taxation to . . . sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 659–60.

64. *See* Forster, *supra* note 42, at 410.

65. *Allegheny*, 492 U.S. at 664.

66. Leading Cases, supra note 8, at 219.

67. *Compare* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 881 (2005) (upholding the Sixth Circuit's ruling on a preliminary injunction finding that the government's purpose was to emphasize the Ten Commandments' religious message in violation of the Establishment Clause), *with* Van Orden v. Perry, 545 U.S. 677, 691–92 (2005) (ruling that a monument inscribed with the Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause).

In *Van Orden v. Perry*[68] and *McCreary County v. ACLU of Kentucky*,[69] the Justices were again divided between those asserting that the government may not express favoritism toward particular religions[70] and those preferring to accommodate religious government displays.[71]

The Justices favoring the constitutionality of government "acknowledgement" of religion prevailed in *Van Orden*. The display at issue was a six-foot high stone monument depicting the text of the Ten Commandments and incorporating an eagle, an American flag, stone tablets, two Stars of David, and the Greek characters Chi and Rho signifying Christ.[72] The monument was located on public land near the Texas State Capitol building.[73] Although the plurality opinion did not articulate a bright-line test, it emphasized the history of religious accommodation and acknowledgement in America and emphasized the monument's passive nature.[74] The Court's analysis is therefore consistent with the coercion test formulated in Justice Kennedy's *Allegheny* dissent, which upholds passive displays that citizens may easily turn away from because they do not constitute compulsion to religious adherence.[75] Justice Stevens's dissent decried the Ten Commandments display as an "official state endorsement" of the monotheistic religions.[76]

However, the Court reached the opposite result in *McCreary*.[77] There, the displays at issue were framed copies of the Ten Commandments hung in the courthouses of two Kentucky counties.[78] One of the displays had been hung in a ceremony presided over by a person holding the public office of "Judge-Executive" accompanied by his pastor, who testified to the existence of God.[79] After the American Civil Liberties Union of Kentucky requested an injunction prohibiting the display, but before the district court responded to the request, the Counties' legislatures authorized the displays' expansion.[80] The expansion included passages from the Declaration of Independence, the Preamble to the Constitution of Kentucky, the motto "In God We Trust," a Congressional Re-

68. 545 U.S. 677 (2005).

69. 545 U.S. 844 (2005).

70. *See McCreary*, 545 U.S. at 859–62; *Van Orden*, 545 U.S. at 718 (Stevens, J., dissenting).

71. *See McCreary*, 545 U.S. at 894 (Scalia, J., dissenting); *Van Orden*, 545 U.S. at 686–88; *see also* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139 (2009) (Scalia, J., concurring) (opining that there are "very good reasons" to believe a permanent Ten Commandments monument in a public park did not violate the Establishment Clause).

72. *Van Orden*, 545 U.S. at 681.

73. *Id.*

74. *See id.* at 686, 691.

75. *See Allegheny*, 492 U.S. at 664 (Kennedy, J., dissenting) (stating that "purely passive" monuments are not coercive, and therefore, not inconsistent with the Establishment Clause because passersby are free to avert their eyes from them).

76. *Van Orden*, 545 U.S. at 712 (Stevens, J., dissenting).

77. *Id.* at 703 (Breyer, J., concurring).

78. *McCreary*, 545 U.S. at 850.

79. *Id.* at 851.

80. *Id.* at 852–53.

cord proclaiming 1983 as the Year of the Bible, and other documents containing phrases alluding to religion.[81] The only commonality among the documents was that each had a "religious theme or [was] excerpted to highlight a religious element."[82] After the district court granted the ACLU's request for an injunction, the counties again revised the display.[83] The third display incorporated secular and religious political documents[84] alongside the Ten Commandments and was labeled "The Foundations of American Law and Government Display."[85]

In invalidating the third display, the Court stated that its guiding principle was neutrality between religion and non-religion.[86] Although the Court did not explicitly apply the endorsement test, it referenced its rationale and reaffirmed the aspect of the test prohibiting a state from intentionally preferring religion.[87] In response to Justice Scalia's dissent,[88] the Court noted that governmental approval of the core tenants of a favored religion "should trouble anyone who prizes religious liberty" because such beliefs should be "reserved for the conscience of the individual."[89] The Court thus had the endorsement test's central concerns well in mind. The Court ruled that the previous overtly religious displays clearly indicated to any reasonable observer that the third display, though containing secular elements, was a ploy "to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality."[90]

Justice Breyer was the only swing vote between *McCreary* and *Van Orden*. To explain the difference between the cases, Justice Breyer's concurrence in *Van Orden* pointed to the *McCreary* displays' "stormy history" rife with religious motive as demonstrating the county governments' religious objectives.[91] Justice Breyer then distinguished the dis-

81. *Id.* at 853–54.

82. *Id.*

83. *Id.* at 854–55.

84. These documents were the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the motto "In God We Trust," the Preamble to the Kentucky Constitution, and a picture of Lady Justice. *Id.* at 856.

85. *Id.* at 855–56.

86. *Id.* at 860.

87. *See id.* ("By showing a purpose to favor religion, the government sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . ." (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000)) (alterations in original) (internal quotation marks omitted)).

88. Justice Scalia's dissent asserted that the Constitution permits government acknowledgement of a single creator and "disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists" in governmental acknowledgment of a single creator. *McCreary*, 545 U.S. at 893 (Scalia, J., dissenting).

89. *See id.* at 880–81 (majority opinion).

90. *Id.* at 872–73.

91. Van Orden v. Perry, 545 U.S. 677, 703 (2005) (Breyer, J., concurring).

play at issue in *Van Orden* as having no such history clearly underscoring an impermissible religious purpose.[92]

These cases demonstrate that the Court is split almost down the middle between Justices who see an Establishment Clause allowing governmental acknowledgement, accommodation, and even favoritism of religious sects in the absence of coercion, and Justices who interpret the Establishment Clause to demand neutrality and prohibit government endorsement of religion. The most recent development in this conflict is seen in *Salazar v. Buono*, in which the principles of "accommodation" invade the endorsement test.

II. *SALAZAR V. BUONO*

A. Facts

The Mojave National Preserve (Preserve) sits in the Mojave Desert of Southeastern California.[93] The federal government owns ninety percent of the Preserve's roughly 25,000 square miles, including a granite outcropping known as Sunrise Rock.[94] In 1934, a private organization known as the Veterans of Foreign Wars erected an eight-foot tall Latin cross on Sunrise Rock, as a memorial to fallen World War I soldiers.[95] The cross was visible from a small nearby road and the site came to host periodic Easter gatherings.[96] The cross was initially accompanied by plaques declaring "The Cross, Erected in Memory of the Dead of All Wars" and "Erected 1934 by Members of Veterans of Fore[ign] Wars, Death Valley post 2884." [97] However, at the time of the litigation, the cross stood without any markers.[98]

In 1999, the National Park Service denied a request to place a Buddhist shrine near the cross.[99] As an alternative to allowing equal access to Sunrise Rock for all religious groups, the National Park Service announced that it would remove the cross.[100] Shortly before litigation com-

92. *Id.*
93. Salazar v. Buono (*Buono*), 130 S. Ct. 1803, 1811 (2010).
94. *Id.*
95. *Id.* at 1811–12.
96. *Id.* at 1812.
97. *Id.* (quoting Buono v. Kempthorne, 527 F.3d 758, 769 (9th Cir. 2008), *rev'd*, 130 S. Ct. 1803 (2010)). Since this case was decided, the cross has been stolen off of Sunrise Rock. A metal replacement cross was placed on the rock by an anonymous party. The National Park Service has since removed the replacement cross. Mary Jean Dolan, Salazar v. Buono*: The Cross Between Endorsement and History*, 105 NW. U. L. REV. COLLOQUY 42, 43–44 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/21/LRColl2010n21Dolan.pdf.
98. *Buono*, 130 S. Ct. at 1812.
99. Lisa Shaw Roy, Salazar v. Buono*: The Perils of Piecemeal Adjudication*, 105 NW. U. L. REV. COLLOQUY 72, 73 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/23/LRColl2010n23Roy.pdf.
100. *Id.*

commenced, Congress responded by enacting a statute "forbidding the use of governmental funds to remove the cross."[101]

Frank Buono is a retired National Park Service employee who regularly encounters the cross.[102] Buono first became aware of the cross while working as the assistant superintendent of the Preserve in 1995.[103] While driving down the nearby road, he saw the cross affixed to Sunrise Rock.[104] Buono took offense to the cross's presence on public land because he believed it was wrong for the government to display the symbol of one religion in an area not open to displays of symbols representing other religions.[105] He was not, however, offended by the cross itself and did not claim that it personally excluded or coerced him.[106] Buono claimed that he would take less convenient routes to traverse the preserve in order to avoid the cross.[107]

B. Procedural History

Buono filed suit in the United States District Court for the Central District of California, alleging that the cross's presence on federal land violated the Establishment Clause.[108] While the case was pending, Congress designated the cross and the land upon which it stood as a national memorial.[109]

In a July 2002 ruling, the district court found that Buono had standing to challenge the cross's display on public lands.[110] The parties agreed that the court should settle the dispute's merits under the *Lemon* test.[111] The court did not consider *Lemon*'s purpose or entanglement prongs because it found that the case could be resolved under the effect prong.[112] The court ruled that the cross had an effect of advancing religion because the reasonable observer would perceive the cross as a governmental endorsement of religion.[113] The district court issued a permanent injunction forbidding the government "from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[114]

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101. *Buono*, 130 S. Ct. at 1813 (citing Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230 (2000)).
102. *Id.* at 1812.
103. Buono v. Norton (*Buono II*), 212 F. Supp. 2d 1202, 1207 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).
104. *Id.*
105. *Id.*
106. *Buono*, 130 S. Ct. at 1814.
107. *Buono II*, 212 F. Supp. 2d at 1207.
108. *Buono*, 130 S. Ct. at 1812.
109. *Id.* at 1813 (citing Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278).
110. *Id.* at 1812.
111. *Id.*
112. *Buono II*, 212 F. Supp. 2d at 1214–16.
113. *Id.* at 1216.
114. *Buono*, 130 S. Ct. at 1812.

After the district court's decision, Congress passed a second statute forbidding government spending to remove the cross.[115] While the Government's appeal was pending, Congress passed yet another statute providing for the transfer of the cross and the adjoining land to the Veterans of Foreign Wars. In exchange, the government was to receive land in the preserve owned by a Veterans of Foreign Wars member.[116] The parcel of land to be transferred to the Veterans of Foreign Wars was one acre in area.[117] This statute provided that the land would revert back to the government if it ceased to be a World War I memorial.[118]

The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling in its entirety.[119] In doing so, the Ninth Circuit declined to consider the potential impact of the pending land transfer on the suit.[120] Although the Government urged the Ninth Circuit to declare the case moot because the land transfer would end any state action that could violate the Establishment Clause, the court refused to consider whether the land transfer affected the cross's constitutionality.[121] The court provided three reasons for not reaching the issue of the land transfer. First, the court noted that the pending land transfer might have taken years to actually complete, meaning that the constitutionality of the cross before the transfer was not necessarily moot now, nor would it be anytime soon.[122] Second, Sunrise Rock might still ultimately fall into government ownership if the transfer's reversionary clause came into effect.[123] Third, the court cited precedent from the Seventh Circuit suggesting that transfers of property containing religious iconography to private holders do not necessarily cure Establishment Clause violations, so mootness in the event of the transfer was not a foregone conclusion.[124] The Government did not appeal the Ninth Circuit's ruling to the Supreme Court. Therefore, the judgment that the cross violated the Establishment Clause while it stood on federal land became final and unreviewable.[125]

Buono then brought action to prevent the land transfer under an enforcement or modification of the 2002 injunction.[126] The district court ruled that Congress had enacted the land transfer statute with the explicit purpose of circumventing the injunction to permit continued display of

115. *Id.* at 1813 (citing Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1519, 1551 (2002)).

116. *Buono*, 130 S. Ct. at 1813 (citing Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1054, 1100 (2003)).

117. *Buono*, 130 S. Ct. at 1829 (Stevens, J., dissenting).

118. Department of Defense Appropriations Act, 2004 § 8121(e).

119. Buono v. Norton, 371 F.3d 543, 546–50 (9th Cir. 2004).

120. *Id.* at 545–46.

121. *Id.* at 545–46.

122. *Id.* at 545.

123. *Id.* at 546.

124. *Id.* (citing Freedom From Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 496 (7th Cir. 2000)).

125. *Buono*, 130 S. Ct. at 1813.

126. *Id.* at 1813–14.

the cross on Sunrise Rock. Consequently, the court invalidated the land transfer statute in order to protect Buono's rights under the 2002 judgment.[127] The court of appeals affirmed and the United States Supreme Court granted certiorari.[128]

C. United States Supreme Court Plurality Opinion

Justice Kennedy wrote the opinion of the Court, joined by Chief Justice Roberts, and joined in part by Justice Alito.[129] After addressing Buono's standing to sue and the merits of his claim, the Court remanded the case to the district court without answering whether Congress could evade the Establishment Clause through a transfer of land.[130]

First, addressing Buono's standing, the Court set forth the general rule that a plaintiff must allege a sufficient personal stake in a case's outcome to invoke federal court jurisdiction.[131] The Court ruled that Buono had standing to seek enforcement of the injunction against the land transfer because he had a personal stake in the Government's compliance with the judgment in his favor.[132] The Government could not challenge Buono's standing to obtain the original injunction because the Government's failure to seek Supreme Court review of the 2002 judgment foreclosed reconsideration of the original injunction.[133]

Next, the Court considered the merits of the case. The Court criticized the district court's scrutiny of Congress's purpose in enacting the land transfer statute. Justice Kennedy argued that the analysis ignored three contextual considerations of Congress's decision to transfer the land.[134] First, the cross's initial placement on Sunrise Rock was an effort to memorialize soldiers, rather than to endorse Christianity.[135] Second, the cross's existence on the Preserve for seven straight decades had cemented it in the public consciousness.[136] Third, in enacting the land transfer statute, Congress reconciled a dilemma between violating the injunction and conveying disrespect for the memorialized soldiers.[137] In doing so, Congress chose "a policy of accommodation" to avoid conveying disrespect and stewing "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[138] According to the

127. *Id.* at 1814 (citing Buono v. Norton, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005)).
128. *Buono*, 130 S. Ct. at 1814.
129. *Id.* at 1808.
130. *Id.* at 1820–21.
131. *Id.* at 1814 (quoting Horne v. Flores, 129 S. Ct. 2579, 2592 (2009)).
132. *Id.* at 1814–15.
133. *Id.* at 1814.
134. *Id.* at 1816.
135. *Id.* at 1816–17.
136. *Id.* at 1817.
137. *Id.*
138. *Id.* at 1817, 1820 (quoting Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring)).

Court, the context at hand suggested a sincere congressional attempt "to balance opposing interests."[139]

Finally, grudgingly assuming the 2002 injunction's propriety,[140] the Court asserted that the district court should not have evaluated the injunction's applicability to the land transfer under a purpose inquiry.[141] Rather, the district court should have considered the injunction's applicability in light of its original objective, avoiding perceptions of governmental religious endorsement.[142] Justice Kennedy outlined the proper analysis, stating that the district court must: (1) consider whether the reasonable observer standard applies to objects on private land;[143] (2) reassess the findings underlying the 2002 injunction in light of the new circumstances surrounding the cross, affording particular consideration to Congress's "policy of accommodation";[144]and (3) consider remedies less severe than a full invalidation of the land transfer.[145]

Declining to offer any more guidance on the constitutional issues, the Court remanded the case to the district court.[146]

D. Dissent

Justice Stevens, joined by Justice Ginsburg and Justice Sotomayor, argued in favor of upholding the ruling below.[147] According to Justice Stevens, the land transfer constituted an affirmative government act designed to permit the cross's display in violation of the injunction's bar against "permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[148]

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139. *Buono*, 130 S. Ct. at 1817.

140. *See id.* at 1818 ("[T]he propriety of the 2002 injunction may be assumed, [but] the following discussion should not be read to suggest this Court's agreement with the judgment . . . . The constitution does not oblige government to avoid any public acknowledgement of religion's role in society.").

141. *Id.* at 1819.

142. *Id.*

143. *Id.* A question to which the court suggests an answer in the negative. *Id.*

144. *Id.* at 1820.

145. *Id.*

146. *Id.* at 1820–21. In addition to Justice Kennedy's plurality opinion, three Justices wrote concurring opinions. Chief Justice Roberts's concurring opinion briefly noted that Buono's counsel admitted it would likely be consistent with the injunction if the government tore down the cross, transferred the land to the Veterans of Foreign Wars, and allowed them raise the cross again. *Id.* at 1821 (Roberts, C.J., concurring). The Chief Justice asserted it would make no difference "to skip that empty ritual." *Id.* Justice Alito agreed with the plurality, but argued that the Court should have ruled on the merits because the factual record was sufficiently developed to support a ruling in the government's favor. *Id.* (Alito, J., concurring in part and concurring in the judgment). Justice Scalia, joined by Justice Thomas, argued that the Court should have dismissed Buono's complaint for lack of standing. *Id.* at 1824–25 (Scalia, J., concurring in the judgment).

147. *Id.* at 1828 (Stevens, J., dissenting). Justice Breyer wrote a separate dissent. He argued that the Court should resolve the case in Buono's favor under the law of injunctions, which grants great deference to a district court's interpretation of scope of its own injunctive orders. *Id.* at 1842–45 (Breyer, J., dissenting).

148. *Id.* at 1831 (Stevens, J., dissenting).

Additionally, Justice Stevens argued that the land transfer would not cure the endorsement that prompted the 2002 injunction because a reasonable observer would still perceive a governmental endorsement after the land transfer.[149] Justice Stevens reasoned that an observer would know that the cross had stood on government land prior to the transfer, that the district court had enjoined the government from displaying it, and that Congress had designated the cross as a national memorial and transferred the underlying land to a purchaser it knew would display the cross.[150] Furthermore, Justice Stevens argued that Congress's purpose in enacting the land transfer statute was to preserve the Christian symbol, which in and of itself manifested religious endorsement.[151] In stating that "continued endorsement" of a message as "starkly sectarian" as the one symbolized by the cross was unlawful, Justice Stevens's dissent unambiguously embraced the endorsement test and declared that the cross at issue failed it.[152]

III. ANALYSIS

In *Buono*, the Court directed the district court to reassess the enforceability of Buono's injunction in light of its original objective of "avoiding the perception of government endorsement."[153] However, the Court's actual framework resembled the endorsement test only in name. The endorsement test, as originally formulated, protects a worthwhile constitutional principle. *Buono* raises important concerns with respect to that principle. The district court can stave off the erosion of that principle by carefully applying the Court's framework in a manner consistent with the reasons the test was developed in the first place.

A. The Endorsement Test's Core Value

The Court developed the endorsement test to protect the worthwhile principle that government should not "mak[e] adherence to a religion relevant in any way to a person's standing in the political community."[154] In other words, the government should not encourage the perception that members of certain religious groups are favored or preferred over members of other religious groups. When the government indicates that it favors or prefers particular religious beliefs, it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[155] Individuals

149. *Id.* at 1832–33.
150. *Id.* at 1833–34.
151. *Id.* at 1837–38.
152. *Id.* at 1828, 1832–33.
153. *Id.* at 1819 (plurality opinion).
154. *See* Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).
155. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

then find themselves in a position where they must choose between the religious convictions of their consciences and adherence to beliefs that will earn them a perceived favored status in the community. This dilemma is an obstacle to enjoying the religious liberty that the Establishment Clause is intended to protect. Because the endorsement test prevents the government from creating that pressure and forcing such a choice, it protects religion from government manipulation to a far greater degree than a test that would only protect against direct legal compulsion to practice religion. The endorsement test is particularly helpful where messages conveyed by public religious displays implicate the Establishment Clause because the test focuses on the communicative effect of the state action.[156]

It has been argued that the Establishment Clause tests have proven so manipulable that the impact of using one test instead of the other is minimal.[157] According to this perspective, knowing the test will not help one predict the outcome of cases because what really matters is the attitude of the judges deciding the case. While it is true that one cannot stop a Supreme Court Justice determined to bend a constitutional test to reach the result that Justice wants, it goes too far to say the tests are interchangeable.[158] The endorsement test invalidates official actions that endorse religion in purpose or effect, or if they entangle government too closely with religion. The coercion test, on the other hand, only invalidates laws that compel citizens to practice religion or confer extraordinarily direct benefits to religion. The coercion test sees religious monuments as too passive and their benefits to religion too incidental to fail under the Constitution. So while religious displays like the cross in *Buono* could conceivably fail the endorsement test, their invalidation under the coercion test is very unlikely.[159] Conceptually, at least, the endorsement test protects against a wider swath of official action than the coercion test.

Recognizing and curtailing the evil of endorsement helps realize the Establishment Clause's core principle. The framers of the Constitution included the religion clauses precisely because of the nation's religious diversity,[160] and they did so to "assure the fullest possible scope of religious liberty and tolerance for all."[161] When the government conveys mes-

156. Forster, *supra* note 42, at 405.

157. Christopher Lund, Salazar v. Buono *and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60, 70 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/22/LRColl2010n22Lund.pdf.

158. *See* Ian Bartum, Salazar v. Buono*: Sacred Symbolism and the Secular State*, 105 NW. U. L. REV. COLLOQUY 31, 38 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/20/LRColl2010n20Bartrum.pdf ("The doctrinal test the Court adopts necessarily reflects its conception of exactly what the Establishment Clause guarantees . . . .").

159. *See* Gedicks, *supra* note 4, at 704.

160. *Allegheny*, 492 U.S. at 589–90.

161. Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

sages that demonstrate favoritism toward a particular sect, it narrows the scope of liberty by precluding the individual's ability to form his or her own religious values uninhibited by an official doctrine.[162] As Justice Breyer wrote in his controlling concurrence in *Van Orden*, although the Establishment Clause does not require absolute elimination of religion in the public square, realizing the framers' vision requires that the government "effect no favoritism among sects."[163]

Coercion test proponents argue that historical evidence demonstrates that the Framers could not have intended to prohibit public religious preference, citing numerous early American official acts that might fail the endorsement test, such as Congress passing a resolution in 1789 asking President Washington to declare "a day of public thanksgiving and prayer" and state legislative sessions opening with prayer led by publically paid chaplains.[164]

The responses to this contention are twofold. First, the historical evidence cuts both ways. Thomas Jefferson refused to issue Thanksgiving proclamations, believing they violated the Establishment Clause, and James Madison wrote that publically paid chaplains were inconsistent with the "immunity of Religion from civil jurisdiction."[165] Second, the endorsement test is not necessarily inconsistent with allowing traditional public allusions to religion, such as those mentioned above and the phrases "under God" and "In God We Trust," when they serve to "solemniz[e] public occasions, or inspir[e] commitment to meet some national challenge."[166] These functions give such practices an "essentially secular meaning" under the endorsement test because their purpose and effects are not to advance religious ideals and because the impact of their religious meaning has been blunted through repetition.[167]

The latter point has been criticized as a disingenuous attempt to ignore the religious significance inherent in religious statements, even when ubiquitously or ceremonially used.[168] After all, it is not clear why reference to God would serve to solemnize occasions or strengthen the nation's resolve in the face of a challenge unless the listener accepts the premise that God is real. There is some validity to the contention that if the Court were consistent in applying the endorsement test, then a number of entrenched, politically popular, and in some instances longstanding governmental acknowledgement of religion would have to be invali-

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162. *See* Steven G. Gey, The Procedural Annihilation of Structural Rights, 61 HASTINGS L.J. 1, 11 (2009).

163. *Van Orden*, 545 U.S. at 698–99 (Breyer, J., concurring) (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)).

164. *Van Orden*, 545 U.S. at 686–88 (plurality opinion).

165. *Id.* at 724–25 (Stevens, J., dissenting).

166. Lynch v. Donnelly, 465 U.S. 668, 716–17 (1984) (O'Connor, J., concurring).

167. *Id.*

168. *Van Orden*, 545 U.S. at 695 (Thomas, J., concurring).

dated. It is perhaps most honest to say that the agreed-upon contours of the Establishment Clause have been slow to form and at some points in American history the opponents of government neutrality in matters of religion have succeeded in distorting the line. As described above, disagreement over how much the Establishment Clause separates church from state is as old as the Establishment Clause itself, so it is not surprising that one would find historical examples of government action that contradicts any given test. This, however, is no reason to abandon the test most conducive to religious liberty going forward. The endorsement test has allowed the Court to actualize the ideal of religious neutrality to the greatest extent feasible given the political reality that some government acknowledgements of religion have become too engrained to realistically abolish.[169]

For the reasons outlined above, the endorsement test preserves and protects an individual's religious choice. The next most viable alternative, the coercion test, protects against too little.

B. Concerns Raised by Buono

The *Buono* plurality opinion raises concerns that the endorsement test's core principle, stating that adherence to religion should not affect a person's political standing, may be endangered. The Court's mandate that the district court reassess the injunction's enforceability in light of the objective to avoid religious endorsement does not serve to assure the maintenance of that principle. Specifically, the plurality directed the district court to engage in an endorsement inquiry because that was the basis for the 2002 injunction,[170] and not because the Court supported the general use of the test. In fact, Justice Kennedy has criticized the endorsement test as "flawed in its fundamentals and unworkable in practice[,]" arguing instead for a standard that allows any government accommodation of religion short of legal coercion or conferring direct benefits on religion to a degree that tends to establish a state faith.[171] Additionally, in his *McCreary* dissent, Justice Scalia has interpreted the Establishment Clause as allowing "public acknowledgement of [a specifically monotheistic] Creator."[172] Moreover, Justice Roberts has previously lobbied for the *Lemon* test's abandonment in favor of a coercion standard. Furthermore, the endorsement test's champion, Justice O'Connor, has been replaced by Justice Alito, who favored defendants in Establishment Clause cases as a Third Circuit judge.[173] Thus, strong evidence suggests that a majority of the current Justices would definitively renounce the en-

169. *See* Gedicks, *supra* note 4, at 700.

170. *Buono*, 130 S. Ct. 1803, 1819 (2010).

171. *See* Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659–60, 669 (1989) (Kennedy, J., concurring in part and dissenting in part).

172. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

173. Forster, *supra* note 42, at 409–10.

dorsement test if presented with a case where, unlike in *Buono*, the procedural posture did not foreclose the opportunity to reach the Establishment Clause claim.[174] Commentators have identified the coercion test as likely to replace the endorsement test as the prevailing Establishment Clause analysis in the near future.[175]

Although the Court did not use *Buono* as an opportunity to repudiate the endorsement test, it has nonetheless begun to erode the test. *Buono*'s distorted interpretation and application of the endorsement test raises three concerns: (1) a blurring of formerly independent aspects of the endorsement analysis; (2) the injection of aspects of the coercion standard that are inconsistent with the endorsement test's central value; and (3) the suggestion that the reasonable observer standard may be categorically inapplicable to objects on private land.

1. Blending the Purpose and Effect Prongs

First, *Buono* improperly blends the purpose and effect inquiries of the endorsement analysis. While Justice O'Connor's endorsement test combined the first two prongs of the *Lemon* test in the sense that they now both focus on endorsement, she made it clear that the law's purpose and effect would continue to be examined independently of one another.[176] Under the endorsement test's original formulation, state action could run afoul of the Establishment Clause if *either* the government passed the law with the purpose to endorse religion *or* if the action conveyed endorsement in effect, regardless of the government's intent.[177] The district court explicitly issued the 2002 injunction after an effect analysis and did not consider whether the cross's presence had a secular purpose.[178]

The *Buono* plurality mandated that the district court reevaluate the land transfer's constitutionality in light of the objectives of the 2002 injunction, even declaring the district court's illicit purpose inquiry improper.[179] It would appear, then, that the Court intends for the district court on remand to only examine the land transfer's effect of endorsing religion and not the transfer's purpose. However, in telling the district court to reassess its findings "in light of the policy of accommodation that Congress had embraced" to "balance opposing interests,"[180] the

174. It is also interesting to note that Justice Stevens, the chief dissenter and advocate for the endorsement test in *Buono*, has since been replaced by Justice Kagan. Justice Kagan argued on behalf of the government in *Buono* as solicitor general. This, of course, does not necessarily mean she will be permissive of religious endorsement in her role as Justice.

175. Gedicks, *supra* note 4, at 692.

176. Lynch v. Donnelly, 465 U.S. 668, 688–90 (1984) (O'Connor, J., concurring).

177. *Id.* at 690.

178. Buono v. Norton (*Buono II*), 212 F. Supp. 2d 1202, 1215 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

179. Salazar v. Buono (*Buono*), 130 S. Ct. 1803, 1819 (2010).

180. *Id.* at 1817, 1820.

Court directs the district court to ask whether Congress's purpose would affect the "perceived governmental endorsement"[181] in a reasonable observer with the knowledge of "all the pertinent facts and circumstances surrounding the symbol and its placement."[182] The Court has made the reasonable observer an exceptionally aware person, knowledgeable of the motivations of members of Congress. This causes the government's purpose to become a central component of the inquiry into whether state action has the effect of endorsing religion, effectively eliminating "effect" as a sufficient ground for invalidating government action independent of "purpose." Therefore, *Buono* could make the endorsement test's original vision of invalidating certain instances of government action because they in fact send a message of religious endorsement—regardless of whether that was the government's intent—difficult to realize.

In blurring the distinction between purpose and effect, the Court endangers protection against government action that inadvertently conveys religious endorsement to a reasonable observer. If the endorsement test was only designed to regulate the government's intentions, then this might be a logical development. However, the endorsement test also protects individuals from social or political perceptions that inhibit their freedom of religion. If the government carelessly conveys messages that create perceptions of religious favoritism, then the harm occurs regardless of the government's actual objectives. The Court would brush aside the protection from the harm if it forced plaintiffs to challenge the government's purpose in order to establish an impermissible effect.

The first post-*Buono* appellate case addressing whether a public religious display violates the Establishment Clause, *American Atheists, Inc. v. Duncan*,[183] offers a potential solution to this merging of purpose and effect by recognizing, and deemphasizing, the relevance of the government's purpose toward the effect of religious endorsement. In *American Atheists*, a number of twelve-foot-high crosses were erected by the Utah Highway Patrol Association (UHPA) to honor fallen Utah Highway Patrol (UHP) officers.[184] With UHP's permission, UHPA placed the crosses on publically owned property including rights-of-way near the highways, rest areas, and the lawn outside the UHP office.[185] Each cross also depicted the UHP insignia.[186] In determining whether these crosses violated the Establishment Clause under the endorsement test, the Tenth Circuit first found that the crosses had primarily secular purposes: honoring

181. *Id.* at 1819.
182. *Id.* at 1819–20.
183. 616 F.3d 1145 (10th Cir. 2010).
184. *Id.* at 1150. The Utah Highway Patrol Association is a private organization supporting the officers and families of the Utah Highway Patrol. *Id.*
185. *Id.* at 1151.
186. *Id.* at 1150.

fallen troopers and promoting highway safety.[187] Next, the court proceeded to an effects analysis, in which the secular purpose was considered. However, the court did not afford Utah's purpose much weight at that stage of the analysis, ruling that the State's purpose was "merely one element of the larger factual and historical context" pertaining to the effect of endorsement.[188] Because the crosses were the "preeminent symbol of Christianity,"[189] were not displayed alongside other symbols to dilute their religious meaning, bore the insignia of the UHP, and were found on public land, the court concluded that a reasonable observer would infer that Utah endorsed Christianity.[190] Declaring this to constitute an Establishment Clause violation, the court noted that such an effect was harmful because reasonable observers would fear that Christians would receive preferential treatment by UHP on the highways and in UHP's hiring processes.[191] The Tenth Circuit emphasized that the purpose of the designers of the cross would not always coincide with their effect on a reasonable observer.[192] While this case bodes well for the endorsement test's continued force after *Buono*, it does not seem to reflect the preeminent role the *Buono* plurality desired purpose to play in the effect inquiry. How future cases will separate these concepts remains a major concern.

2. Infusing the Endorsement Test with the Coercion Test's Principles

Next, by infusing the endorsement test with the coercion test's principles, the *Buono* Court distorts the endorsement test. As discussed above, Justice Kennedy understood the United States' long history of "accommodation" and "acknowledgment" of religion to favor an Establishment Clause interpretation upholding government action as long as it does not involve coercion or direct benefits toward religion.[193] The coercion test would make it difficult for observers to challenge the constitutionality of religious displays to which they can freely turn their backs,[194] even if such challenges are needed to prevent any stigmas from being placed on non-adherents when the government endorses religion. Justice Kennedy's coercion test offers no protection against the coercive effect on a person's religious choices when the government stirs up the perception that certain religions are preferred over others using the potent communicative tool of religious displays. The coercion test's favorable treatment of acknowledgement and accommodation of particular relig-

187. *Id.* at 1157.
188. *Id.* at 1159.
189. *Id.* at 1160 (quoting Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004)).
190. *Am. Athiests, Inc.*, 616 F.3d. at 1160.
191. *Id.* at 1160–61.
192. *Id.* at 1163.
193. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part).
194. *See id.* at 664.

ious views to the exclusion of others in fact seems to invite the perception of favoritism. In this way, the coercion standard is antithetical to the religious liberty values the endorsement test was designed to protect.

However, the *Buono* Court's mandate that the district court reassess whether a reasonable observer would perceive a religious endorsement in light of Congress's policy of accommodation[195] subtly plants the seeds of the endorsement test's mutation into the coercion standard. The *Buono* Court recasts the reasonable observer as someone sympathetic to public policies "accommodating" religion as defined by Justice Kennedy. This affords minimal protection against perceptions of exclusion by members of minority religious groups.[196] A hypothetical observer agreeable to the coercion standard's foundation would allow judges to effectively conduct coercion inquiries in the guise of an endorsement analysis. For example, the observer might see all religious displays which have the effect of identifying a favored religion as not endorsing religion because they are non-coercive, passive accommodations of religion, thereby reaching the same result as would be reached under the coercion test. One could see a merging of Establishment Clause interpretations as something positive because it allows the Court to take account of both sets of values and come closer to a settled rule that will not be so fiercely contested.[197] However, if the endorsement test loses all its teeth and fails to protect religious liberty any more than the coercion test, then the endorsement test will be the product of a hostile takeover rather than a benign compromise.

3. Casting Doubt on the Reasonable Observer Standard

The third concern the *Buono* decision raises stems from the doubt it casts on the reasonable observer standard's applicability to objects on private land.[198] If the reasonable observer standard does not apply, the likely test to replace it, given the current Court's attitude toward Establishment Clause claims, is a per se rule categorically barring challenges to privately owned religious displays because they do not constitute government action. The tone of the *Buono* plurality and concurrences strongly indicates that this is where the Establishment Clause jurisprudence is heading.[199] But, as evidenced by the facts of *Buono*, the government can have substantial connections to private objects on private land, arguably rising to the level of endorsement. Even if the land transfer in this case were implemented, the cross and the land upon which it stands would still have a history of government ownership and would

195. Salazar v. Buono (*Buono*), 130 S. Ct. 1803, 1820–21 (2010).
196. *See* Dolan, *supra* note 97, at 58.
197. *Id.* at 57.
198. *See Buono*, 130 S. Ct. at 1819.
199. *Leading Cases*, *supra* note 8, at 227–28.

still be a national memorial.[200] The small size of the land transferred relative to the Preserve's vast tracts of public land and the lack of markers to distinguish public from private land also tend to minimize the government's distance from the cross.[201] By selling the land to the very group that erected the cross, the government made its best effort to ensure that the cross would stay in place.[202] The government did not consider any transferees other than the Veterans of Foreign Wars, the one group most invested in maintaining the cross.[203] Such favoritism to the one group most likely to preserve the Christian symbol places the government's imprimatur on that symbol. Based on these factors, one could entertain the notion that the cross conveys enough government endorsement of religion to avoid a categorical rejection of the claim.

Taken to its logical extreme, a per se rule might allow the government to exploit a loophole through which it could maintain the display of religious symbols by transferring small patches of land within any of its properties to organizations that the government knows will display the favored symbol.[204] Public areas widely peppered with religious imagery would send a message of endorsement, even to observers who know that private entities own the title to the otherwise indistinguishable patches of land. In order to prevent this result, the Court must employ an individualized fact-sensitive analysis[205] rather than a per se rule.

C. Applying the Core Principle on Remand

Although the Supreme Court's framework biases endorsement inquiries toward results similar to those that would be reached under the coercion standard, and although the Court at most thinly veils its desire to see the cross left in place,[206] the district court can still adhere to that framework without losing sight of the rationales that led to the Court's development of the endorsement test. The Supreme Court essentially provided a three-step analytical framework that the district court must use to evaluate whether the 2002 injunction's objectives necessitate the land transfer's invalidation. First, the district court must consider whether the reasonable observer standard still controls, given the land transfer.[207] The district court must then reconsider whether a reasonable observer, if such a construct is still relevant, would perceive an endorsement in light of the land transfer and its context.[208] Finally, the district

200. *Buono*, 130 S. Ct. at 1833–34 (Stevens, J., dissenting).
201. Forster, *supra* note 42, at 424.
202. *See* Roy, *supra* note 99, at 74.
203. Lund, *supra* note 157, at 67.
204. *Leading Cases*, *supra* note 8, at 228–29.
205. *Id.*
206. Roy, *supra* note 99, at 76.
207. Salazar v. Buono (*Buono*), 130 S. Ct. 1803, 1819 (2010).
208. *Id.* at 1819–20.

court must consider potential relief that is less drastic than an invalidation of the land transfer statute.[209]

First, for reasons already stated, a per se rule restricting the reasonable observer standard's applicability to objects only on public land could produce results inconsistent with preventing governmental religious endorsement. The district court should recognize that the government is capable of endorsing religious symbols regardless of their locations. With an eye toward preventing endorsement, the relevant question in *Buono* should not be whether the cross stands on government land. Rather, the proper question should be whether a reasonable observer would continue to perceive government endorsement of the cross after the land transfer or whether the transfer itself, made to an organization friendly to the cross, is an endorsement of the cross. All else being equal, a cross displayed on private land conveys less government endorsement of Christianity than the same cross displayed on federally owned land. This is because the government directly controls land to which it has title so anything on that land is more directly attributable to the government. But, in the complex case presented by *Buono*, ownership of the land was only one of many factors bearing on public perception of the cross. *Buono* also involved the cross's designation as a national memorial, the reversionary clause requiring that the site be used as a memorial, the government's choice of transferee, and the statutes enacted by Congress to preserve the cross.[210] It may be that none of these factors are sufficient on their own to necessitate removal of the cross, but when taken together a court might reach that conclusion. This is precisely why this case and others like it should be examined in light of all applicable factors through the eyes of a reasonable observer and should not boil down to the single question of whether or not the religious display stands on publically-owned land.[211] Although the reasonable observer standard could be subject to each individual Justice's perception of reasonableness, its contours are capable of becoming better defined over time through case law, providing more consistency and better protection against religious endorsement than the possible alternatives.

Second, once the district court has settled on the applicable standard, it must apply that standard, taking into account the observer's knowledge that Congress chose a policy of accommodation to balance compliance with the injunction against the impact that would have on religious adherents.[212] In general, the desire not to upset members of a particular religion advanced by an Establishment Clause violation does not justify a continued violation. If it did, then the courts could leave most constitutional violations that benefit one individual or group over

209. *Id.* at 1820.
210. *Id.* at 1833–34 (Stevens, J., dissenting).
211. *Leading Cases*, *supra* note 8, at 228–29.
212. *Buono*, 130 S. Ct. at 1819–20 (plurality opinion).

another uncured because losses of illicit advantages usually upset their beneficiaries. Even here, where the public's concern involves secular sensitivity toward seeing a war memorial's removal, such concern does not necessarily overwhelm the compelling need to avoid governmental demonstration of preference for Christian symbols. The Supreme Court has bound the district court to afford due weight to Congress's "dilemma," but it ought not to forget the reasons it originally found the land transfer in violation of the 2002 injunction. If the government's interest in accommodating religion takes precedence over all other factors, then the endorsement test will lose its teeth as well as its distinctiveness from the coercion test.

In applying the reasonable observer standard, the district court should be mindful of how much knowledge it is attributing to the observer. The *Buono* plurality has described an observer far more knowledgeable about the cross's seventy-year history, the litigation surrounding it, the acts of congress pertaining to it, and the motivations behind those acts than most of the park-goers who would realistically encounter the cross. The district court must follow this conception of a reasonable observer. However, if the observer is attributed as much knowledge of the facts as someone who has versed himself or herself in the history of Sunrise Rock, has read the briefs in *Salazar v. Buono*, and was privy to the litigants' oral arguments, then the facts will in effect be viewed through the eyes of a judge rather than through the eyes of a hypothetical observer. Resorting to the subjective perceptions of the Court would defeat the purpose of the reasonable observer construct, which is intended to achieve an objective lens through which to view religious endorsement.[213] In order to maintain the advantages of the endorsement test, the district court should take care not to assume the observer is omniscient and attribute to him or her little if any more knowledge than the Supreme Court has explicitly mandated.

Finally, should the district court determine relief is necessary, it must consider a remedy "less drastic than [a] complete invalidation of the land-transfer statute" and removal of the cross.[214] The court should tailor its relief with an eye toward eliminating the perception that the government favors the Christian members of the political community. If an effect of endorsement exists, then the solution would not be as simple as ensuring that passersby know that the cross is privately owned. This is because the Court has bound the district court to attribute knowledge of the land's private ownership to the hypothetical observer.[215] Visual indicia of private ownership would therefore not tell the observer anything

213. Joseph Blocher, *Schrödinger's Cross: The Quantum Mechanics of the Establishment Clause*, 96 VA. L. REV. IN BRIEF 51, 59 (2010), http://www.virginialawreview.org/inbrief/2010/10/25/blocher.pdf.

214. *Buono*, 130 S. Ct. at 1820.

215. *See id.* at 1819–20.

that he or she does not already know. However, indicia of private ownership might still decrease endorsement by showing to those who already know that the cross is privately owned that the government is making efforts to distance itself from the religious symbol. If observers can see the government attempting to diminish its imprimatur on the cross as much as possible, they will be less likely to perceive favoritism of the cross. Simply installing replicas of the plaques declaring that the Veterans of Foreign Wars erected the cross, as mentioned by the Court,[216] may not sufficiently quash endorsement perceptions. Such a sign would fail to unambiguously emphasize the land's private ownership and might not be visible from the road. A physical barrier like a fence would help distinguish the public and private tracts of land, though that is also problematic because it could turn what is meant to be elegant symbolism, a white cross standing alone in the desert, into an eyesore. That result might not reflect the policy of accommodation that the Court had in mind. A larger transfer of land surrounding the cross would reduce perceptions of endorsement by reducing the cross's proximity to government-owned land.[217] Some might criticize a larger transfer of land to the organization that erected the cross as constituting a worse Establishment Clause violation because it confers a larger benefit on an organization bent on displaying religious symbolism, but if the government exacts a fair price in exchange, then that benefit will be mitigated. A larger land exchange combined with some visual indication that the government does not endorse the cross, like a tasteful sign visible from the road labeling the land as private property, would most likely be sufficient to minimize perceptions of endorsement. Although the district court must assume observers automatically know the cross sits on private land,[218] these efforts would still reduce perceptions of endorsement by demonstrating a bona fide effort by the government to distance itself from the cross.

CONCLUSION

While *Buono* did not offer the Court an opportunity to definitively repudiate the endorsement test, the plurality opinion has nonetheless managed to endanger the policy at the heart of that test. Through its distorted framework, the *Buono* Court has begun to twist the endorsement test into the coercion standard's mold. Because the coercion test does not prevent the degradation of religious liberty that occurs when the government conveys or attempts to convey messages dividing citizens into insiders and outsiders on the basis of their religions, this trend ought to end at *Buono*. Religion is harmed when government manipulation of popular perceptions inhibits individuals from aligning their faiths with their consciences. As the current Court is comprised of Justices hostile to the en-

216. *Id.* at 1820.
217. Forster, *supra* note 42, at 424.
218. *See Buono*, 130 S. Ct. at 1819–20.

dorsement test, the prospects are not promising. On remand, the district court can resist abandoning core constitutional values by carefully applying the Supreme Court's framework without letting go of the rationale behind the initial development of the endorsement test.

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